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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LINCOLN FINLEY et al.,

Plaintiffs and Appellants,

v.

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Defendant and Respondent.

A126944

(Alameda County
Super. Ct. No. RG08401237)

Appellants Lincoln and Latonya Finley (the Finleys), who are self-represented, sued respondent First American Title Insurance Company (First American), in connection with a title insurance policy. The trial court sustained First American's demurrer to the Finleys' fourth amended complaint without leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As this appeal arises from an order sustaining a demurrer, we assume, solely for the purpose of determining whether the complaint stated a cause of action, that the facts pleaded in the complaint are true. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) When the trial court considered First American's demurrer to the Finleys' fourth amended complaint, it granted the Finleys' request to take judicial notice of the allegations of the Finleys' second amended complaint. We shall do likewise.

From the allegations of the Finleys' second and fourth amended complaints, it appears that the Finleys purchased a parcel of property in Alameda County from another couple, John and Laura Halliday (the Hallidays), who, in turn, extended a loan to the Finleys for some portion of the purchase price. The Hallidays agreed to subordinate their loan to a construction loan that the Finleys intended to obtain in order to construct a four-unit residential building on the property. However, the Hallidays did not execute a subordination agreement prior to the close of escrow.

First American prepared a preliminary title report and issued a title insurance policy to the Finleys in connection with the purchase. The Finleys allege that there were several defects in the title that they obtained from the Hallidays, and that First American failed to discover the title defects and disclose them to the Finleys in the preliminary title report. The Finleys also allege that First American failed to pay the claim under the title insurance policy that they filed after learning that the Hallidays had not executed the subordination agreement.

The Finleys filed their initial complaint against First American on July 30, 2008. First American demurred, and the Finleys filed an amended complaint. This process was repeated until the Finleys filed their fourth amended complaint on August 10, 2009. On October 30, 2009, the trial court sustained First American's demurrer to the fourth amended complaint, this time without leave to amend. The Finleys then filed this appeal.

DISCUSSION

A. Appeal from Order Sustaining Demurrer

Preliminarily, we note that the Finleys have appealed from an unappealable order. "An order sustaining a demurrer is interlocutory and not appealable. [Citation.] The appeal must be taken from a subsequent judgment of dismissal. [Citation.] This appeal, however, has been fully briefed by both parties. This court, in the interests of justice and to prevent unnecessary delay, will therefore deem the order sustaining the demurrer as incorporating a judgment of dismissal and treat [the Finleys'] notice of appeal as applying to that judgment. [Citation.]" (*Conley v. Roman Catholic Archbishop* (2000) 85 Cal.App.4th 1126, 1130.)

B. Failure to State Facts Constituting a Cause of Action

When reviewing an appeal arising from the granting of a demurrer without leave to amend, "[w]e accept as true the properly pleaded allegations of fact in the complaint, but not the contentions, deductions or conclusions of fact or law. [Citation.] We also accept as true facts which may be inferred from those expressly alleged. [Citation.]" (*In re Electric Refund Cases* (2010) 184 Cal.App.4th 1490, 1500.) In addition, on an appeal of this type, "we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demur[r]er, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.)

In sustaining First American's demurrer to the Finleys' third amended complaint, the trial court stated, in relevant part, as follows: "[The Finleys] allege that there was an undisclosed mortgage lien, a forgery in the chain of title and improper or incorrect acknowledgement on a deed, which rendered their title unmarketable. Although the [title insurance] policy [issued by First American] allegedly provides coverage . . . if title is unmarketable and this allows a third party to refuse to perform a contract to purchase the land, lease it, or make a mortgage loan on it, [the Finleys] do not allege that the unmarketability caused any of these events to occur. For that reason [the Finleys] have not alleged that they suffered 'actual loss resulting from certain Covered Risks' in order to trigger the right to reimbursement under the policy, and so have not stated a claim [for breach of contract]. . . . Leave to amend is granted to allege breach of the policy based on the fact that the title was unmarketable . . . and that the unmarketability of the title allowed a third party to refuse to perform a contract to purchase the land, lease it, or make a mortgage lien [*sic*] on it. Facts must be alleged that link the unmarketability of the title with actual loss caused by the failure of a third party to refuse [*sic*] to perform a contract An allegation that [the Finleys] would not have purchased the property if they had known about an undisclosed mortgage lien on the property is not sufficient, since that allegation, standing alone, does not show actual loss resulting from the covered risk."

In response to this order, the Finleys included sections in their fourth amended complaint (the operative complaint) that were entitled "Causation of Plaintiffs' Loss and Damages" and "Damages to the Plaintiffs." In these portions of the operative complaint, with respect to First American,¹ the Finleys allege that "[a]s a result of . . . defendant's duty of care to research and expose all past matters and to disclaim any liability in the preliminary report,^[2] plaintiffs['] rights and interest of [*sic*] the subject property was affected[,] causing the plaintiffs to be deprived of property, legal rights or otherwise causing injury" The Finleys also allege that "[a]s a result of defendant's

¹ The operative complaint also makes various allegations of negligent or intentional misconduct by the Hallidays. These may be relevant as background information, but cannot state a cause of action against First American, as the Finleys allege no facts that would warrant holding First American responsible for any actions or omissions on the part of the Hallidays.

² As noted in respondent's brief, there is authority holding that under Insurance Code section 12340.11, a title company owes no duty of care to its insureds in preparing a preliminary title report, as such reports are generated for the insurer's benefit in underwriting the policy, and not for the benefit of the insured. (E.g., *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1189-1192.) Because we affirm on other grounds, we need not and do not address the application of this authority to the present case.

failure to indemnify the claim [*sic*], plaintiffs [were] hindered from obtaining the finance of the construction loan that was promised by [the Hallidays],” and that “plaintiffs [were] hindered from performance and obtaining a construction loan, due to the negligence of the defendant [*sic*] failure to expose and research the title for examination and its duty of care and obligations to disclaim any liability in a preliminary report. Defendant missed critical documents that affected the rights, interest and deprived the plaintiffs of property. Had the defendant research[ed] the title for examination as one of its duties and obligations, it would have been shown that the title was unmarketable and that John and Laura Halliday were not the true owners of record. As [a] direct and proximate result of defendant’s breach of duty and obligations as a matter of law, plaintiffs [have] incurred an actual loss in the amount of \$795,000.”

In sustaining First American’s demurrer to the operative complaint, the trial court reasoned that the Finleys “have alleged that [First American] failed to disclose conditions affecting marketability, but have not alleged facts showing that the alleged unmarketability of title caused their damages.” The court noted that the Finleys contend they were damaged by the Hallidays’ refusal to subordinate their loan to a construction loan that the Finleys were trying to obtain, but the Finleys “have never alleged that the Hallidays’ refusal to subordinate their loan was the result of the conditions of the property that [First American] allegedly failed to disclose.”

Unfortunately, the Finleys’ brief on appeal does not directly address the question whether the allegations of the operative complaint were sufficient to supply the missing elements of any of the causes of action against First American that the Finleys appear to have been attempting to plead.³ Our own examination of the relevant allegations, as quoted above, discloses that although the Finleys allege in conclusory terms that they were “hindered” from obtaining a construction loan by the unmarketability of the title, they do not allege that they actually applied for or even informally requested a loan, or that their application or request was refused due to the defect in their title. This is not sufficient. As already noted, on an appeal arising from an order sustaining a demurrer, “[w]e accept as true the properly pleaded allegations of fact in the complaint, but not the contentions, deductions or conclusions of fact or law. [Citation.]” (*In re Electric Refund Cases, supra*, 184 Cal.App.4th at p. 1500.)

³ As noted in respondent’s brief, the operative complaint recast the Finleys’ breach of contract cause of action into a purported cause of action for “breach of duty.” For purposes of this appeal, we construe the operative complaint in the manner most favorable to the Finleys. We therefore read it as attempting to plead causes of action for breach of contract, breach of the duty of good faith and fair dealing, and/or negligence. All of these causes of action require, however, that the Finleys allege that they suffered a loss *caused by* the alleged defects in their title that First American failed to discover and disclose.

Appellants have the burden of demonstrating error. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) On an appeal arising from an order sustaining a demurrer without leave to amend, “the burden falls upon the plaintiff to show what facts he or she could plead to cure the existing defects in the complaint. [Citation.] ‘To meet this burden, a plaintiff must . . . on appeal, enumerate the facts and demonstrate how those facts establish a cause of action.’ [Citation.]” (*Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 166.) The Finleys have not sustained that burden on this appeal.

DISPOSITION

The order sustaining First American’s demurrer to the Finleys’ fourth amended complaint is construed as a judgment in favor of First American, and, as such, is affirmed. In the interests of justice, the parties shall bear their own costs on appeal.

RUVOLO, P. J.

We concur:

REARDON, J.

SEPULVEDA, J.